

**United States Department of Labor
Employees' Compensation Appeals Board**

N.K., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
WURTSMITH AIR FORCE BASE,)
Port Austin, MI, Employer)

Docket No. 07-1700
Issued: December 18, 2007

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from a May 21, 2007 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has established that he sustained asbestosis causally related to factors of his federal employment.

FACTUAL HISTORY

On May 30, 2006 appellant, then a 74-year-old retired plant foreman, filed an occupational disease claim alleging that he sustained asbestos poisoning of the lungs causally related to factors of his federal employment. He first became aware of his condition when he experienced difficulty breathing the previous winter. A lung specialist informed him that he had

asbestos in his lungs. Appellant described in detail his daily work with asbestos for 26 years while working for the employing establishment.¹ He retired from the employing establishment on August 31, 1987. Appellant submitted witness statements from coworkers who confirmed that he worked daily around asbestos during the course of his federal employment.

In a report dated March 6, 2006, Dr. Jose Marquina, a Board-certified internist, related that he treated appellant for “shortness of breath and difficulty breathing after an upper respiratory infection.” A computerized tomography (CT) scan revealed a large pleural plaque. Dr. Marquina noted his history of asbestos exposure and related that “this could be a consequence of his exposure.”

On February 19, 2007 the Office referred appellant to Dr. David W. Rosenbaum, a Board-certified internist, for a second opinion examination. In a report dated March 5, 2007, Dr. Rosenbaum discussed appellant’s history of exposure to asbestos at work and symptoms of dyspnea beginning the previous year. He smoked cigarettes for 36 years until he stopped in 1987. Appellant also underwent a fusion of the back. Dr. Rosenbaum noted that an April 16, 2007 CT scan of the chest showed “calcification changes in the thoracic aorta” but no “significant pleural plaques or interstitial lung disease.” Pulmonary function studies revealed lung capacity of 59 percent of predicted without postbronchodilator improvement. Dr. Rosenbaum diagnosed pneumonia by history, morbid obesity, chronic obstructive pulmonary disease due to smoking, and a history of a spinal fusion, all of which he found contributed to appellant’s decrease in pulmonary function. He further noted appellant’s long history of asbestos exposure during the course of his federal employment and stated:

“[H]e was employed as a heating equipment mechanic and later a foreman, there clearly was significant asbestos exposure during certain periods of time; particularly, when the boilers need to be replaced. The CT [scan] of the chest ... demonstrates no significant interstitial lung disease or pleural plaques or fibrosis, suggesting mild pulmonary asbestosis. He does have restrictive lung disease, based on his recent pulmonary function studies, which asbestos could cause, but this is probably also aggravated by his morbid obesity....”

Dr. Rosenbaum concluded:

“As stated above, I feel his symptoms of dyspnea on exertion and fatigue is multifactorial related to all the factors mentioned above. Probably the most important factor, which may have precipitated my examination, was his recent episode of left-lower lobe pneumonia, which as I stated above, is not a work-related problem.

“Based on his pulmonary function studies and history of exposure to asbestos, I feel he does have mild pulmonary asbestosis, which probably accounts for 15 percent of his present pulmonary function. The remainder is related to his chronic

¹ The employing establishment could not comment on appellant’s asbestos exposure due to lack of adequate records.

obstructive pulmonary disease, morbid obesity, spinal fusion, left lower lobe pneumonia and advanced age.”

By decision dated May 21, 2007, the Office denied appellant’s claim on the grounds that the medical evidence was insufficient to establish that he sustained asbestosis due to the established work factors. The Office determined that Dr. Rosenbaum did not definitely attribute appellant’s abnormal pulmonary function study results to asbestosis. The Office also noted that he interpreted a CT scan as revealing no pulmonary abnormalities.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁵ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁶ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁷

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.⁸ While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that

² 5 U.S.C. §§ 8101-8193.

³ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁶ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁷ *Beverly A. Spencer*, 55 ECAB 501 (2004).

⁸ *Vanessa Young*, 55 ECAB 575 (2004).

justice is done.⁹ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁰

ANALYSIS

Appellant attributed his lung condition to his exposure to asbestos during the course of his federal employment. The Office accepted the occurrence of the claimed employment factors but denied his claim after finding that the medical evidence did not establish that he sustained asbestosis due to the accepted work exposure. In support of his claim, appellant submitted a March 6, 2006 report from Dr. Marquina, who treated appellant for shortness of breath and breathing problems following a respiratory infection. Dr. Marquina found that a pleural plaque on a CT scan could be due to his asbestos exposure.

The Office referred appellant to Dr. Rosenbaum for a second opinion examination. Dr. Rosenbaum noted appellant's history of cigarette smoking and prior back fusion. He interpreted a CT scan obtained on April 16, 2007 as showing calcification in the thoracic aorta but no other significant abnormalities. A pulmonary function revealed that appellant had 59 percent of his predicted lung capacity without significant improvement after bronchodilator. Dr. Rosenbaum diagnosed pneumonia by history, morbid obesity, chronic obstructive pulmonary disease due to smoking, a history of a spinal fusion and restrictive lung disease possibly due to asbestosis. He found that all of the diagnosed conditions contributed to appellant's shortness of breath and fatigue. Dr. Rosenbaum further opined, "Based on his pulmonary function studies and history of exposure to asbestos, I feel he does have mild pulmonary asbestosis, which probably accounts for 15 percent of his present pulmonary function. The remainder is related to his chronic obstructive pulmonary disease, morbid obesity, spinal fusion, left lower lobe pneumonia and advanced age."

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.¹¹ Once the Office undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case.¹² The Board finds that, although Dr. Rosenbaum's report is insufficiently rationalized to meet appellant's burden of proof, it stands uncontroverted in the record and raises an inference of causal relationship sufficient to require further development by the Office. Accordingly, the Board finds that the case must be remanded to the Office. On remand, the Office should request that Dr. Rosenbaum submit a supplemental, clarifying report on the issue of whether appellant has asbestosis caused or aggravated by factors of his federal employment. Following this and any other development deemed necessary, the Office shall issue an appropriate decision.

⁹ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁰ *Melvin James*, 55 ECAB 406 (2004).

¹¹ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹² *See Melvin James*, *supra* note 10.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 21, 2007 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board